Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

CIRCUIT CITY STORES, INC.,
Petitioner,
v.
SAINT CLAIR ADAMS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Whether the Ninth Circuit erred in holding, directly contrary to the holding of every other United States Court of Appeals, that the Federal Arbitration Act does not apply to contracts of employment?

2. Whether the Ninth Circuit erred in holding, contrary to this Court's opinion in *Gilmer v. Interstate/Johnson Lane*, 500 U.S. 20, 25 n.2 (1991), and the liberal federal policy favoring arbitration agreements, that any agreement to arbitrate between an employer and an employee constitutes an "employment contract" excluded from coverage under the Federal Arbitration Act?

STATEMENT OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit. Circuit City Stores, Inc. ("Circuit City"), which has a wholly-owned subsidiary, CarMax Auto Superstores, Inc. ("CarMax"), is a publicly traded company with two series of common stock. Circuit City group common stock tracks the performance of Circuit City, while CarMax group common stock tracks the performance of CarMax. Circuit City has retained an equity interest in CarMax group common stock. No other publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

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SAINT CLAIR ADAMS,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Circuit City Stores, Inc. ("Circuit City") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 18, 1999.[1] In the alternative, Circuit City requests summary reversal of the Ninth Circuit's decision in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, whose judgment is here sought to be reviewed, is reported at *Circuit City Stores, Inc. v. Adams*,

[1] A separate Petition for a Writ of Certiorari is being filed concurrently herewith in a related case, *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), which was decided by the same Ninth Circuit panel on the same date, and presents the same questions for review.

194 F.3d 1070 (9th Cir. 1999) (per curiam), reprinted in the Appendix.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994), provides in pertinent part:

> *Section One* "[C]ommerce," as herein defined, means commerce among the several states or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.
>
> * * * *
>
> *Section Three* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the Court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

> *Section Four* A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. §§ 1, 3, 4 (1994).

STATEMENT OF THE CASE

In March 1995, Circuit City implemented an "Associate Issue Resolution Program" ("AIRP"). Following implementation of the AIRP, prospective applicants are required, as part of the job application process, to execute a document entitled "Circuit City Dispute Resolution Agreement" ("DRA") by which they agree to resolve "any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator." (ER 63.) (emphasis in original).[2] Prospective applicants for employment with Circuit City must agree to the terms of the DRA in order to have an application for employment considered. (ER 60.) A prospective appli-

[2] "ER" and "SER" cites refer to the Excerpts of Record and Supplemental Excerpts of Record on file with the Ninth Circuit Court of Appeals.

cant may withdraw his or her agreement to arbitrate within three days of execution by withdrawing his or her application for employment. (ER 64.)

The arbitration agreement is a separate, stand-alone agreement between the prospective applicant and Circuit City, entered into as part of the application process. The obligation to arbitrate exists independent of the employment relationship, and applies before, during and after employment. (ER 63-64.) The arbitration agreement specifically disclaims any status as an employment contract. (ER 63.) ("I understand that neither this agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me.").[3]

On October 23, 1995, Respondent Saint Clair Adams ("Adams") executed a copy of the arbitration agreement as part of his application for employment. (ER 55.) Following a period of employment, on November 26, 1997, contrary to the terms of the arbitration agreement, Adams sued Circuit City in a California superior court for a variety of employment-related legal claims. (ER 4-13.) Pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994) ("FAA") and 28 U.S.C. § 1332 (1996), Circuit City filed a Petition to Stay State Court Action and to Compel Arbitration in the United States District Court for the Northern District of California ("Petition"). (SER 1-30.) On May 1, 1998, the district court granted the Petition and entered an Order staying the state court action and compelling arbitration. (ER 87-96.)

Adams appealed to the United States Court of Appeals for the Ninth Circuit. (ER 100.) The Ninth Circuit recognized that the arbitration agreement contains an ex-

[3] The Dispute Resolution Rules and Procedures contain the rules and procedures governing arbitrations conducted pursuant to the parties' agreement to arbitrate. (ER 69-80.)

press acknowledgement that it is not an employment contract. *Adams*, 194 F.3d at 1071. The Ninth Circuit also recognized that the arbitration agreement expressly states that it "in no way alters the 'at-will' status of . .. employment." *Id.* Nonetheless, the Ninth Circuit concluded that "the [arbitration] agreement was a condition precedent to [Adams's] employment," and thus, "was an employment contract, rendering the FAA inapplicable."[4] *Id.* at 1072. The Ninth Circuit based this holding on its prior decision in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999) (per curiam), which held, contrary to every other federal appellate court in the United States, that the statutory exclusion found at Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1994), must be read broadly to exclude coverage of all contracts of employment. *See Adams*, 194 F.3d at 1071-72, *citing Craft*, 177 F.3d at 1094.

As a result, the Ninth Circuit reversed the decision of the district court compelling arbitration, and remanded the case to the district court for dismissal "because of a lack of federal authority." *Id.*

[4] This holding appears to be directly at odds with the Ninth Circuit's ruling in *Circuit City Stores, Inc. v. Ahmed*, 195 F.3d 1131 (9th Cir. 1999) (per curiam), the companion case in which a writ of certiorari also is sought. In *Ahmed*, the Ninth Circuit found the arbitration agreement at issue to be an "employment contract" even though the court expressly found that the AIRP documents stated that participation was "voluntary," and expressly held that participation in the AIRP was "*not* a condition precedent to employment." *Id.* at 1133 (emphasis added).

REASONS FOR GRANTING REVIEW

I. THE NINTH CIRCUIT'S BROAD READING OF THE FAA SECTION ONE EXCLUSION CREATES AN INTOLERABLE CONFLICT AMONG THE LOWER COURTS.

By holding that the district court lacked authority to compel arbitration, the Ninth Circuit has interpreted the exclusion found in Section One of the FAA for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," 9 U.S.C. § 1 (1994), in a manner which directly conflicts with every other United States court of appeals. The decision also conflicts directly with the decision of a state court of last resort within the geographic area covered by the Ninth Circuit. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996). Finally, the Ninth Circuit's decision also raises an important issue not settled by the Supreme Court, which in fact has expressly been reserved by this Court.[5]

Based on a broad reading of the FAA Section One exclusion, the Ninth Circuit made the blanket pronouncement that "the FAA does not apply to labor or employment contracts," *Adams*, 194 F.3d at 1070, and further interpreted "employment contracts" broadly to encompass virtually all contracts between employers and employees. *Id.* Thus, in the Ninth Circuit's view, no agreement to arbitrate disputes entered into by an employer and an employee may be enforced pursuant to the FAA. *Id.*

[5] This Court previously has reserved the question of the proper scope to be given to the FAA Section One exclusion. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 n.2 (1991) (Court leave[s] for another day the issue raised by amici curiae" as to proper scope of the FAA Section One exclusion). This question was reserved over the dissent of Justice Stevens and Justice Marshall. *Id.* at 36. As in *Gilmer*, the arbitration program at issue here also is not part of a "contract of employment." *See infra* Section II.

However, this broad reading of the FAA Section One exclusion directly conflicts with *every* other federal appellate court. Rather, every other United States court of appeals has found the FAA Section One exclusion to be narrow, applying only to employment contracts of seamen, railroad workers, and other employees actually engaged in the movement of goods in interstate commerce. *See Dickstein v. duPont*, 443 F.2d 783, 785 (1st Cir. 1971) ("Courts have generally limited this exception to employees . . . involved in, or closely related to, the actual movement of goods in interstate commerce."); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) ("In light of the strong national policy in favor of arbitration as a means of settling private disputes we see no reason to give an expansive intepretation to the exclusionary language of [FAA] Section 1."); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 227 (3rd Cir.), *cert. denied*, 522 U.S. 915 (1997) ("[T]he only class of workers included within the exception to the FAA's mandatory arbitration provision are those employed directly in the channels of commerce itself."); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274 (4th Cir. 1997) ("The circuit courts have uniformly reasoned that the strong federal policy in favor of arbitration requires a narrow reading of this Section 1 exemption."); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 748 (5th Cir. 1996) ("We agree with the majority of other courts which have addressed this issue and conclude that § 1 is to be given a narrow reading."); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 600-01 (6th Cir. 1995) ("We conclude that the exclusionary clause of § 1 of the [FAA] should be narrowly construed to apply to employment contracts of seamen, railroad workers and any other class of workers actually engaged in the movement of goods in interstate commerce in the same way that seamen and railroad workers are."); *Matthews v. Rollins Hudig Hall Co.*, 72 F.3d 50, 53

n.3 (7th Cir. 1995) ("[T]his exclusion is limited to transportation workers . . . ."); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 835 (8th Cir. 1997) ("We are persuaded by the reasoning of those circuits which have held that Section 1 applies only to contracts of employment for those classes of employees that are engaged directly in the movement of interstate commerce."); *McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576 (10th Cir. 1998) ("[T]he workers engaged in interstate commerce exclusion does not encompass all employment contracts, just those of employees actually engaged in the channels of interstate commerce."); *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054, 1060-61 (11th Cir. 1998) (per special concurrence of Cox, Circuit Judge, for a majority of the Court) (narrow construction of FAA Section One exclusion "accords with the statute's text and history"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1472 (D.C. Cir. 1997) ("[S]ection 1 of the FAA only excludes from the provisions of the Act the employment contracts of workers engaged in the transportation of goods in commerce.").

Further, since the Ninth Circuit decided *Craft*, the Seventh Circuit has considered and expressly disagreed with *Craft*. *See Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 363-64 (7th Cir.), *cert. denied*, 120 S.Ct. 44 (1999) ("We acknowledge that our finding of jurisdiction [under the FAA] is in disagreement with the Ninth Circuit, which recently held that all contracts of employment are outside the scope of the FAA. However, other circuits which have addressed this issue have concluded, as we have, that such employment contracts are not excluded from the purview of the FAA.") (citations omitted).

Thus, the Ninth Circuit stands alone in its view that the FAA Section One exclusion reaches all contracts of employment. In contrast, the more logical view is that when drafting the FAA Section One exclusion, Congress

had in mind specific transportation workers for whom special arbitration legislation already existed. In *Tenney Eng'g, Inc. v. United Elec. Radio and Mach. Workers of Am.*, 207 F.2d 450 (3rd Cir. 1953), the Third Circuit Court of Appeals analyzed the scope of the FAA Section One exclusion. Considering the text of the statute as well as the legislative history, the court concluded that when the FAA originally was drafted in 1925, Congress was aware that statutory arbitration mechanisms already existed for seamen (46 U.S.C. § 651)[6] and railroad employees (Railway Labor Act § 7, 45 U.S.C. § 157 (1994 & Supp. III 1997)). *Id.* at 452, n.7, 8; *see also Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 601 (6th Cir. 1995) (finding FAA Section One exclusion to have been added by Congress to overcome objections of Seamen's Union). In the Third Circuit's view, Congress's addition of language regarding "any other class of worker engaged in foreign or interstate commerce" was intended:

> to include only those other classes of workers who are likewise engaged directly in commerce . . . . The draftsmen had in mind the two groups of transportation workers as to which special arbitration legislation already existed and they rounded out the exclusionary clause by excluding all other similar classes of workers.

Tenney at 452-53.

As a result of the Ninth Circuit's solitary position, an intolerable conflict is presented. Specifically, employers within the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, and the territories of Guam and the Northern Mariana Islands,

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[6] The seamen arbitration statute in effect when the FAA was drafted later was repealed, *see* Pub. L. 98-89, Aug. 26, 1983, leaving to seamen other statutory dispute resolution procedures. *See, e.g.*, 46 U.S.C. 10302(b) (1994).

now are precluded from relying on the FAA in federal court to enforce arbitration agreements with employees who are not transportation workers. However, employers and employees in forty-one other states and Puerto Rico may obtain precisely that relief.

Likewise, the conflict presents a predicament for large national employers like Circuit City, with operations both within and outside the geographic area covered by the Ninth Circuit. Such employers who use the same arbitration agreement for their entire workforce now are barred from seeking enforcement of arbitration agreements pursuant to the FAA in federal courts within the Ninth Circuit, while such relief is available outside the Ninth Circuit. As a result, the Ninth Circuit's position creates an intolerable conflict affecting thousands of employers and many hundreds of thousands of employees.

This conflict is not simply hypothetical, but actually exists for the petitioner. Two other federal courts of appeals have reviewed the same arbitration program under the FAA. *See Johnson v. Circuit City Stores, Inc.*, 148 F.3d 373, 377 (4th Cir. 1998) (recognizing that " 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration' ") (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))); *Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 637 (7th Cir. 1999) (enforcing the arbitration agreement under the FAA). Neither court found the agreement to arbitrate to be an "employment contract," or otherwise excluded from coverage under the FAA.

Finally, the Ninth Circuit's decision on this issue also directly conflicts with that of the Supreme Court of Hawaii, located within the Ninth Circuit's geographic

area. *See Brown v. KFC Nat'l Management Co.*, 82 Haw. 226, 236, 921 P.2d 146, 156 (1996) ("[W]e believe that the narrow interpretation of the section 1 exclusion is correct . . . ."). Thus, employers and employees in Hawaii, including Circuit City, seeking enforcement of arbitration agreements under the FAA are faced with directly conflicting interpretations of the FAA, depending on whether they seek to compel arbitration in state or federal court. A definitive ruling by this Court as to the proper scope of the FAA Section One exclusion will remove these intolerable conflicts.

II. THE NINTH CIRCUIT'S BROAD VIEW OF WHAT CONSTITUTES AN "EMPLOYMENT CONTRACT" FOR PURPOSES OF THE FAA SECTION ONE EXCLUSION CREATES AN INTOLERABLE CONFLICT WITH SUPREME COURT AUTHORITY.

Review of the Ninth Circuit's decision is warranted for a second and separate reason. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court expressly declined to address the issue of the appropriate scope of the FAA Section One exclusion because the arbitration agreement presented there was contained in a securities industry "U-4" registration form ("Form U-4"), required as a condition precedent to working as a broker in the securities industry, rather than in an employment contract. *Id.* at 25 n.2. As a result, the clear direction from this Court is that, regardless of the "broad" or "narrow" scope of the FAA Section One exclusion, arbitration agreements which are not "contracts of employment" are not excluded from coverage by the FAA. *Id.*

Like the arbitration agreement in a securities registration application in *Gilmer*, 500 U.S. at 25 n.2, this arbitration agreement is not contained in a contract of employment, and accordingly, the exclusionary language of FAA Section One cannot apply. Specifically, both pros-

pective licensees under the Form U-4 and prospective applicants under the arbitration agreement are required to agree to arbitrate employment-related legal claims against their employer as a condition precedent to employment. *Id.* at 25 n.2. Both agreements establish the obligation to arbitrate, but have no further impact on setting the terms and conditions of employment. (ER 62-67.) Neither agreement sets the wages, hours, working conditions, period of employment or various other terms normally found in an employment contract. (*Id.*) In fact, the arbitration agreement executed by Adams specifically disclaims any status as an employment contract. (ER 63) ("I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me. . . . If Circuit City does accept my application for employment and I become employed at Circuit City, this Agreement in no way alters the 'at-will' status of my employment."). By its own terms, then, the arbitration agreement is not an employment contract. Rather, like the Form U-4, the arbitration agreement is a separate, stand-alone agreement by which Adams agreed to arbitrate any and all employment-related legal disputes in exchange for Circuit City's agreement to consider his application for employment. Furthermore, the arbitration agreement is not a "contract of employment" because it applies not only to applicants who ultimately are hired by Circuit City, but also to unsuccessful applicants, who never become employed by the Company. *See Johnson v. Circuit City*, 148 F.3d 373, 378 (4th Cir. 1998) (finding adequate consideration for the arbitration agreement even though applicant was never hired by Circuit City).

Thus, even if the Ninth Circuit is correct (and every other federal court of appeals is wrong) in its broad reading of the scope of the FAA Section One exclusion,

the decision that Adams's agreement to arbitrate falls within the FAA Section One exclusion as a "contract[] of employment," still conflicts with this Court's opinion in *Gilmer, supra*, and with the "liberal federal policy favoring arbitration agreements" reflected in the FAA. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

III. THE NINTH CIRCUIT'S DECISION IS AN ERROR SO IMPORTANT THAT IT MUST BE CORRECTED IMMEDIATELY.

The Ninth Circuit's erroneous interpretations of (1) the scope of the FAA Section One exclusion, and (2) what constitutes a "contract of employment," have a serious and immediate impact on thousands of employers and employees. For example, Circuit City is a national company employing approximately 60,000 Associates. The Company has approximately 10,000 Associates employed in the nine states within the Ninth Circuit. If the Ninth Circuit's decision is permitted to stand, Circuit City will be in the untenable position of being permitted to move to compel arbitration pursuant to the FAA in every court except those under the authority of the Ninth Circuit.

This serious and immediate impact is not limited to Circuit City, but is shared by all businesses that employ persons both within and outside the geographic scope of the Ninth Circuit. The Ninth Circuit's erroneous rulings present for them the same intolerable conflict.

Moreover, employers who operate solely within the nine states covered by the Ninth Circuit now are deprived completely of their federal statutory right to seek enforcement in federal court of agreements to arbitrate employer-employee disputes, a right expressly granted to them by Congress when enacting the FAA, *see* 9 U.S.C. §§ 3, 4 (1994), and recognized by this Court. *See Gilmer*, 500

U.S. at 24-25. By contrast, their counterparts in forty-one other states may pursue this relief.

Lastly, under *Adams, supra*, the Ninth Circuit's view is that any agreement requiring arbitration of disputes between employers and employees is a "contract of employment" excluded from coverage by the FAA. In contrast, employers and employees outside the Ninth Circuit with such agreements are not deprived of the statutory protections and procedures available in the FAA.

By granting certiorari on the issues presented, this Court can remove the conflict currently existing and ensure a nationally uniform interpretation of the FAA's Section 1 exclusion.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted. As an alternative to granting this Petition, Circuit City respectfully requests summary reversal of the Ninth Circuit's decision in this case.

Respectfully submitted,

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February 16, 2000

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15992

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Plaintiff-Appellee,
v.

SAINT CLAIR ADAMS,
a California resident,
Defendant-Appellant.

Argued and Submitted October 4, 1999
Filed November 18, 1999

Appeal from the United States District Court
for the Northern District of California
D.C. No. CV-98-00365-CAL
Charles A. Legge, District Judge, Presiding

JUDGES: Before: Betty B. Fletcher, Dorothy W. Nelson, and Melvin Brunetti, Circuit Judges.

OPINION

PER CURIAM:

This is an appeal from the district court's final order compelling arbitration under the Federal Arbitration Act,

9 U.S.C.A. § 1, *et seq.* (West 1999) ("FAA"). We have jurisdiction pursuant to 28 U.S.C. § 1291. The district court, however, lacked the authority, as a matter of substantive law, to compel arbitration because the Federal Arbitration Act does not apply to this case. In *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1094 (9th Cir. 1999), we held that the FAA does not apply to labor or employment contracts.

Factual and Procedural Background

Saint Clair Adams appeals the district court's order staying the state court action and compelling abritration. Circuit City sought mutually binding arbitration under Section 4 of the FAA in response to Adams's state court lawsuit under the California Fair Employment and Housing Act ("FEHA"). On October 23, 1995, Adams completed a six-page application to work at Circuit City Stores. On pages two and three of the application, Adams signed a document titled "Circuit City Dispute Resolution Agreement" ("DRA"). The DRA requires that employees submit all claims and disputes to mutually binding arbitration.[1] An employee cannot work at Circuit City without signing the DRA. If the employee signs the DRA and then withdraws consent within three days, the employee "will no longer be eligible for emplyoyment at Circuit City."

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[1] The DRA specifies that job applicants agree to settle "all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, exclusively by final and binding arbitration before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments to the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and law of tort."

Standard of Review

The Ninth Circuit reviews de novo the district court's order compelling arbitration. See *Zolezzi v. Dean Witter Reynolds, Inc.*, 789 F.2d 1447, 1449 (9th Cir. 1986). The existence of subject matter jurisdiction is a question of law reviewed de novo. See *Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1153 (9th Cir. 1998).

Discussion

Circuit City sought arbitration pursuant to Section 4 of the FAA and asserted jurisdiction pursuant to Section 4 and 28 U.S.C. § 1332. We recognize that the FAA is not a jurisdictional statute:

> [The FAA] is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal question jurisdiction under [§ 1331] or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other basis for federal jurisdiction.

(*Moses H. Cone Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n. 32, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). In this case, we need not consider whether the district court had underlying federal question jurisdiction because the FAA is inapplicable. As a threshold matter, therefore, the district court lacked the authority under Section 4 of the FAA to compel arbitration.

We must find that the FAA is inapplicable to this case under *Craft* if the DRA is an employment contract. This court has defined an "employment contract" as "an

agreement setting forth 'terms and conditions' of employment." *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374, 1376 (9th Cir. 1994) (quoting Black's Law Dictionary 525 (6th ed. 1990)).

We find that the arbitration agreement in this case was an employment contract notwithstanding the disclaimer in the DRA. The DRA specifically states: "I understand that neither this Agreement nor the Dispute Resolution Rules and Procedures form a contract of employment between Circuit City and me." Furthermore, it says that "this Agreement in no way alters the 'at-will' status of my employment." Though the DRA may not alter Adams's status as an at-will employee, the agreement was a condition precedent to his employment. The agreement was an employment contract, rendering the FAA inapplicable. See *Craft*, 177 F.3d at 1094. Thus, we reverse the district court's order compelling arbitration and remand to the district court for dismissal because of a lack of federal authority.

REVERSE AND REMAND.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C98-0365 CAL

CIRCUIT CITY STORES, INC.,
a Virginia corporation,
Plaintiff,

v.

SAINT CLAIR ADAMS,
a California resident,
Defendant.

Decided April 29, 1998
Filed April 29, 1998;
Entered in Civil Docket May 1, 1998

JUDGES. Charles A. Legge, United States District Court Judge.

Opinion by: Charles A Legge.

OPINION AND ORDER STAYING STATE COURT ACTION AND COMPELLING ARBITRATION AND DENYING RULE 11 SANCTIONS

THIS MATTER, having come regularly before the Court and the Court having considered the Notice of Hearing on Petition to Stay State Court Action and to Compel Arbitration; Petition to Stay State Court Action and to Compel Arbitration; Memorandum of Points and Authorities in Support Thereof; Declaration of Pamela

G. Parsons in Support of Petition to Stay State Court Action and to Compel Arbitration and exhibits therto; Defendant's Memorandum of Points and Authorities in Opposition to Motion [sic] to Stay State Court Action and to Compel Arbitration; Declaration of Saint Clair Adams in Opposition to Petition to Stay State Court Action and to Compel Arbitration and exhibits thereto; and Circuit City's Reply Memorandum in Support of Petition to Stay State Court Action and to Compel Arbitration; as well as Circuit City's Notice of Motion and Motion for Rule 11 Sanctions; Memorandum of Points and Authorities in Support Thereof; Declaration of Rex Darrell Berry in Suppot of Motion for Rule 11 Sanctions and exhibits thereto; Defendant's Memorandum of Points and Authorities in Opposition to Motion to Impose Rule 11 Sancitons; Declaration of Angela M. Alioto in Opposition to Plaintiff's Motion to Impose Rule 11 Sanctions; and Reply Memorandum of Petitioner Circuit City Stores, Inc. in Support of Motion for Sanctions; and the parties having appeared at oral argument through their respective counsel of record; and the Court being fully advised; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. Circuit City's Petition to Stay State Court Action and to Compel Arbitration is GRANTED. The basis for this Order is set forth in the Court's oral opinion, a copy of which is attached as Exhibit A hereto, and is incorporated by reference. The California Superior Court action entitled "Saint Clair Adams v. Circuit City Stores, Inc.; Derrick Iman; Scott Stevens; Geoff Collins and DOES 1 through 10, inclusive," Sonoma County Superior Court Case No. S-CV-217898 is hereby STAYED in its entirety pending completion of the arbitration of this dispute. All claims raised by Respondent in the Sonoma County Superior Court lawsuit Case No. S-CV-217898, are hereby compelled into arbitration pursuant to the Dispute Resolution Agreement between Respondent and Circuit City.

2. Circuit City's Motion for Rule 11 Sanctions is DENIED. The basis for this Order also is set forth in the Court's oral opinion, and is incorporated by reference.

DONE IN OPEN COURT this 29 day of April, 1998.

CHARLES A. LEGGE
United States District Court Judge

EXHIBIT A

BEFORE THE HONORABLE CHARLES A. LEGGE, JUDGE

San Francisco, California

Friday, April 3, 1998

THE CLERK: Civil Action 98-0365, Circuit City Stores, Inc., versus Saint Clair Adams.

Counsel, your appearance, please.

MS. ALIOTO: Angela Alioto for plaintiff, Your Honor.

MR. ROBINSON: Steven L. Robinson with the plaintiff.

MR. BERRY: Good morning, Your Honor. Rex Berry on behalf of Circuit City, the petitioning party.

THE COURT: All right. This is the petitioner's motion to stay the state court proceedings and to compel arbitration.

I've gone over the moving and opposing papers, and does either side have anything further you'd like to add?

MR. BERRY: Only in response to whatever questions the court might have.

THE COURT: All right. I don't think it's necessary.

Counsel, do you want to add anything?

MS. ALIOTO: No, Your Honor.

THE COURT: All right. This is the petitioner's motion to compel arbitration and to stay the state court proceedings pending that arbitration.

There was a civil action filed by the respondent here against the petitioner here and three others in superior court, and the allegation is discrimination and alleged harassment by the employer based on the plaintiff's sexual orientation.

And then the petitioner, the company, has come to this court and requested a stay of the state court action and an order compelling the arbitration.

The arbitration arises from the dispute resolution agreement which was signed by—I'll refer to the respondent here and the plaintiff in the state court case as Mr. Adams—signed by Mr. Adams.

The record indicates to me that there began some employment problems that Adams brought to somebody's attention in November of 1996 and that he then left Circuit City as an employee in November of 1996 of course complaining effective discharge.

He also filed a request for arbitration when he left that I have here and I'll refer to in more detail in a moment. The record doesn't indicate that Circuit City replied to that written request for arbitration until the action is filed in state court.

Now, the first question, of course, is whether this court has jurisdiction to be entering an arbitration order; and it's clear the court has to have jurisdiction, subject matter jurisdiction, over the matter that's independent of the basic Federal Arbitration Act. That's 9 U.S. Code, Section 1.

Circuit City alleges diversity jurisdiction; and, indeed, Mr. Adams is a California resident and Circuit City is a Virginia corporation with its principal place of business in Virginia.

The complaint in state court also alleges three individual defendants as supervisors; but for purposes of diversity and for all petitions to compel, I am to consider the citizenship simply of the plaintiff and the party with whom he signed the arbitration agreement, and that is Circuit City. So I believe that I have subject matter jurisdiction.

There's no dispute that Mr. Adams signed the dispute resolution agreement, which contains this arbitration clause, when he was hired in 1995, but he raises certain arguments as to why the arbitration requirement should not be enforced.

One is that he did apparently request some arbitration in 1996 in November and didn't receive any reply to that, so he argues that Circuit City has waived it.

However, when I look at the arbitration demand, which is a letter of November 22nd, 1996, the request for arbitration just refers to an appeal of benefits. It really does not make any reference to the claims now made here; that is, that there was sexual harassment or perhaps discrimination and hostile work environment.

So since he did not raise that issue specifically in his November 22nd, 1996, demand for arbitration, I don't believe that the company has waived its right to compel arbitration in this case.

Mr. Adams also makes the argument that the arbitration agreement is an unconscionable contract of adhesion, but I believe it's clear here that the contract is to be interpreted to bind both parties, that is, Mr. Adams and the company, to arbitration.

There are, indeed, some limitations on the recovery stated in this arbitration agreement, but I don't believe that they amount to the extreme one-sidedness that's required for a finding of unconscionability as a matter of law, and I'm referring specifically to the Golenia, G-o-l-e-n-i-a case, Didonato, D-i-d-o-n-a-t-o, case, and O'Neil versus Hilton.

So in view of the strong state and federal policy, particularly the federal policy announced in the Arbitration Act, I find that the contract is enforceable.

The argument is made that this would be contrary to the Anti-Injunction Act. However, I think it's clear from the U.S Supreme Court decision in Moses Cohn, that the Anti-Injunction Act does not prevent a federal court to—from entertaining a petition to compel arbitration, and that's true even though the underlying suit—the underlying dispute to be arbitrated is one pending in state court.

So I think there is ample authority under both federal and state law for compelling arbitration even—compelling arbitration in the state court dispute and to stay a state court action pending completion of that arbitration.

That's been done in several cases. Just two examples are Williams & Associates versus McMahon and Network Cinema against Glassburn, and then also Circuit City against Gonzales in the Eastern District of California.

So for all those reasons, the motion to compel arbitration and to stay will be granted.

The motion for Rule 11 sanctions will be denied. I think the opposition is in good faith with some legal support for it; and although I'm ruling against the respondent on this matter, I do not believe it's one where Rule 11 sanctions are called for.

So I will ask the petitioner here to submit an order for signature that grants the arbitration and stays the state court proceeding.

Thank you.

MR. BERRY: Thank you, Your Honor.

MS. ALIOTO: All right. Thank you very much, Your Honor.

(Whereupon proceedings adjourned at 9:50 a.m.).